



# The Arbitration Review of the Americas

2022

**International Arbitration in the  
Caribbean**

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The Arbitration Review of the Americas 2022 covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; and has eleven overviews, including two on arbitrability (one focused on Brazil in the context of allegations of corruption, the other on the relationship with competence-competence across the region). There's also a lucid guide to the interpretation of "concurrent delay" around the region, using five scenarios.


Other nuggets include:

- helpful statistics from Brazil's CAM-CCBC, showing just how often public entities form one side of an arbitration;
  - an exegesis on the questions that US courts must still grapple with when it comes to enforcing intra-EU investor-state awards;
  - a similarly helpful summary of recent Canadian court decisions;
  - another on Mexican court decisions that showed a rather mixed year; and
  - the discovery that the AmCham in Peru as of July 2021 now engages in ICC-style scrutiny of awards.
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# International Arbitration in the Caribbean

**Francois Lassalle** and **Hana Doumal**

British Virgin Islands International Arbitration Centre (BVIIAC)

## Summary

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## IN SUMMARY

Twenty years ago, international arbitration only took place in the metropolitan hubs of America, Western Europe and Asia. The importance of international commercial arbitration as a dispute settlement mechanism is now quickly becoming recognised in quarters where it had been previously disregarded. We are witnessing a geographic democratisation of arbitration seats.

This is particularly true in the Caribbean. The region is a very attractive location to host arbitration because of its neutral geography at the crossroads of the Americas and the mixture of its legal regimes, covering both common and civil law. Disputants may seriously want to consider some of those jurisdictions, particularly the British Virgin Islands, which established the BVI International Arbitration Centre (BVI IAC) in 2016, the first of its kind in the Caribbean.

This article provides a brief insight into the intensification of arbitration in the Caribbean region as illustrated by those countries' attempts to institute the necessary framework to establish themselves as international arbitration centres. It examines the extent to which territories have modernised their legal systems to make them conducive to international arbitration by modernising their arbitration legislation and ratifying the New York Convention 1958.

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## DISCUSSION POINTS

- Democratisation of arbitration seats
  - The intensification of international arbitration in the Caribbean: a jurisdictional analysis
  - Best Caribbean arbitration jurisdictions
  - BVI International Arbitration Centre
  - Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 in the Caribbean
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## REFERENCED IN THIS ARTICLE

- UNCITRAL
- New York Convention
- BVI Arbitration Act (2015)
- OHADAC
- Lord Mustill

## THE RISE OF ARBITRATION IN THE CARIBBEAN

Twenty years ago, very few jurisdictions had the necessary infrastructure to accommodate international arbitration. It was reserved for the metropolitan hubs of America and Western Europe, where the thriving business environment, and the transboundary nature of many transactions, demanded such a dispute settlement mechanism.

In America, the American Arbitration Association was established in the 1920s and administered domestic arbitration. It then established<sup>[1]</sup> the International Centre for Dispute Resolution in 1996, which mostly catered to international arbitration in the United States.

In Western Europe, most international arbitration was split between the Permanent Court of Arbitration in The Hague, Netherlands; the International Chamber of Commerce (ICC) in Paris, France; and the London Court of International Arbitration (LCIA) in the United Kingdom.

In Asia, Hong Kong, which established the Hong Kong International Arbitration Centre in 1985,<sup>[2]</sup> and Singapore, which established the Singapore International Arbitration Centre in 1991,<sup>[3]</sup> both of which have now become key international arbitration centres, had not yet positioned themselves as major venues for settling international commercial disputes.

The situation in developing countries was no better. For instance, while Mauritius is now seeking to establish itself as a sophisticated international arbitration jurisdiction with the establishment of the Mauritius International Arbitration Centre, which is associated with the LCIA, until 1992, its arbitration law was modelled after 19th century English legislation, as was the case with many other former English colonies in Africa at the time.

In Latin America, countries influenced by the 19th century ideals of Carlos Calvo, enunciated in the Calvo Doctrine, generally shied away from international arbitration. Notwithstanding the establishment of international arbitration centres in Dubai and Bahrain in the past two decades, generally, Middle Eastern states too have historically been impervious to international arbitration.

With the advent of globalisation, the tides turned. The impact of the global economy and the continuing trend of the increasing volume, size and complexity of cross-border transactions fuelled the demand for international arbitration as a mean for resolving transnational disputes.<sup>[4]</sup> International arbitration is now the accepted mechanism for dispute resolution between parties to international commercial agreements and allows companies to avoid national courts in favour of a demonstrably neutral predetermined decision maker that the parties have the opportunity to choose.

In particular, international arbitration allows the parties to an agreement to decide in advance how matters will be addressed in the event of an unresolved dispute: the choice of arbitral organisation – of which there are many – the place of arbitration, the language to be used, the number and selection of arbitrators, the prevailing law and procedures to be followed.<sup>[5]</sup> The confidentiality of arbitration proceedings and the ability of successful parties to have their awards enforced in over 150 signatory states to the New York Convention are other key reasons why arbitration has become such a popular mechanism for resolving international commercial disputes. The evolving nature of global commerce has seen the rise of arbitration in jurisdictions that were not traditionally arbitration jurisdictions.

Yet, even with international commerce's continued growth, and the increasing demand for international arbitration as an alternative to litigation, large swathes of the world continued to lack the infrastructure to offer this dispute resolution mechanism. At the turn of the century, many countries had not ratified the 1958 New York Convention, nor did they have modern arbitration legislation for which the United Nations Commission on International Trade Law (UNCITRAL) Model Law had been created in 1985 to serve as a guide. The Caribbean region was one such group of countries.

Nevertheless, the importance of international commercial arbitration as a dispute settlement mechanism is quickly becoming recognised in quarters where this has been previously disregarded. This is particularly true in the Caribbean. The region is a very attractive location to host arbitration because of its neutral geography at the crossroads of the Americas and the mixture of its legal regimes, covering both common and civil law.

Moreover, with the ramping up of domestic legislation to facilitate the creation of international business companies, the region has become home to a remarkable number of offshore corporate entities. This has made jurisdictions such as the British Virgin Islands (BVI), the Cayman Islands and Bermuda very attractive offshore financial centres, with a need to bolster their offering for dispute resolution.

With the intensification of commerce, Caribbean countries have come to appreciate the need for a geographically neutral dispute settlement mechanism; thus, in the past decade, the region has experienced a shift towards the promotion of international arbitration. Numerous jurisdictions are following the path that countries in the metropolitan world travelled many years ago.

As greater globalisation forces companies to contemplate legislative regimes that can better facilitate their disputes, the amendments to the region's suite of arbitration legislation aims to improve the legal frameworks supporting the conduct of international arbitration in the different jurisdictions. This has seen jurisdictions in the region begin to enhance their legal systems. The Bahamas, Barbados, Bermuda, the BVI, the Dominican Republic, Jamaica, and Trinidad and Tobago all seek to establish the infrastructure that would enable them to capitalise on the increasing demand for international arbitration in the Caribbean.

Disputants may seriously want to consider some of those jurisdictions, particularly the BVI, which established the BVI International Arbitration Centre (BVI IAC) in 2016, the first of its kind in the Caribbean; Barbados, which established the Arbitration and Mediation Court of the Caribbean (AMCC) in 2018; and Jamaica with the Mona International Centre for Arbitration and Mediation (MICAM) and the University of the West Indies. Thus, whereas jurisdictions in this region historically did not really consider arbitration a priority, in the past decade especially, some have been keen on pioneering new legislation and institutions.

The Organisation for the Harmonisation of Business Law in the Caribbean (OHADAC) has also undertaken an immense amount of work in this regard. As a vector of regional integration in the Caribbean, the OHADAC Principles on International Commercial Contracts seek to provide a neutral and reliable tool for all traders within the Caribbean market, regardless of their legal culture. However, this article focuses on the individual efforts of Caribbean jurisdictions in promoting international arbitration in the region. It examines the domestic initiatives undertaken by Caribbean countries to develop international arbitration over the past few years.

'Arbitration infrastructure in the Caribbean region' examines the extent to which countries in the region have established the necessary infrastructure to capitalise on the demand for international arbitration in this part of the world. This entails the extent to which those legal systems' arbitration laws are up-to-date and the extent to which they mirror international best practice as reflected in the UNCITRAL Model Law on International Commercial Arbitration 1985. It also examines the extent to which Caribbean jurisdictions have ratified the New York Convention 1958, under which successful parties can enforce awards in this treaty's 150 plus contracting states.

'The intensification of international arbitration in the Caribbean' examines the different jurisdictions individually, in their various phases of development. This includes the following jurisdictions: the Bahamas, Barbados, Bermuda, the BVI, the Dominican Republic, Jamaica, and Trinidad and Tobago.

'International arbitration in the Caribbean' offers suggestions that will further enhance the attractiveness of the region as a destination for international arbitration. Although the suggestions include recommendations for jurisdictions that do not have modern arbitration legislation to enact such legislation and those that have not ratified the New York Convention to do so, it also considers general requirements, such as maintaining and enhancing political stability, respecting the rule of law and ensuring impartial judiciaries, which is a key asset to the arbitration process.

### **ARBITRATION INFRASTRUCTURE IN THE CARIBBEAN REGION**

For a long time, little could be said about international arbitration in the Caribbean as this dispute settlement mechanism was underdeveloped and the region had not yet focused its attention on international arbitration. For instance, in 1994, Robert Lubic surveyed 17 territories in 'The Present Status of International Commercial Arbitration in the English Speaking Caribbean'.<sup>[6]</sup> At the time, very few of those jurisdictions were parties to the 1958 New York Convention and even fewer had adopted the UNCITRAL Model Law 1985.

However, an arbitration project had been started under the auspices of the Caribbean Law Institute, and the advisory committee on the subject met for the first time in December 1988 to consider harmonisation of arbitral laws across the region. Two draft model laws, for domestic and international commercial arbitration, respectively, were prepared and approved.

This initiative came to a standstill, notably because of perceptions that arbitration was too slow, there would be judicial interference in the arbitral process, the initial focus should be on domestic arbitration, and there were higher government priorities to be dealt with other than arbitration.<sup>[7]</sup> Lubic concluded that 'the reason for the apparent failure of the project was that it was too ambitious'.<sup>[8]</sup>

Fast-forward two decades and most of those jurisdictions have begun recognising the critical role of having a neutral, efficient and speedy dispute settlement mechanism capable of resolving disputes arising out of international commercial transactions. Yet, to take advantage of all the benefits attached to this dispute settlement mechanism, it is crucial that those jurisdictions ensure their arbitration regimes are current and reflect international best practice.

It is especially essential that jurisdictions vying to become key venues for the conduct of international arbitration make the necessary policy upgrades to their legal systems to facilitate this endeavour. Two key policy attributes of all the major international arbitration centres globally are their enactment of modern legislation, many of which are based on the UNCITRAL Model Law, and their ratification of the New York Convention.

### **UNCITRAL Model Law 1985**

Notwithstanding the prominence attached to party autonomy, since arbitration is underpinned by a contractual agreement between the parties in dispute, the desire to protect the arbitral process from arbitrariness makes it necessary for jurisdictions hosting arbitrations (*lex arbitri*) to have effective legislation that will guide the conduct of arbitrations.

The UNCITRAL created a Model Law in 1985 that countries can use as a road map in establishing their own domestic legislation.

The UNCITRAL Model Law is designed to assist states in reforming and modernising their laws on arbitral procedure to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by states of all regions and the different legal or economic systems of the world.

Amendments to articles 1(2), 7 and 35(2), a new Chapter IV A to replace article 17 and a new article 2A were adopted by UNCITRAL on 7 July 2006. The revised version of article 7 is intended to modernise the form requirement of an arbitration agreement to better conform to international contract practices. The newly introduced Chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the UNCITRAL Model Law is the amended version.<sup>[9]</sup>

Examination of the countries that have enacted legislation based on the UNCITRAL Model Law reveals that the vast majority of jurisdictions in the Caribbean have not enacted modern legislation based on the UNCITRAL Model Law. To date the only jurisdictions in the region that have enacted modern legislation based on the UNCITRAL Model Law are Bermuda (1993), the Dominican Republic (2008) and the BVI (2013).<sup>[10]</sup>

While only three jurisdictions out of the numerous civil law and common law jurisdictions that make up the Caribbean legal landscape have enacted modern arbitration legislations, the recent enactment of modern legislation by the BVI and prospective enactment by Jamaica may serve as a stimulus for other jurisdictions to do the same as they increasingly come to appreciate the benefits of such policies on their ability to attract business opportunities to their borders.

### **Convention On The Recognition And Enforcement Of Foreign Arbitral Awards 1958**

The New York Convention is a key instrument in international arbitration.<sup>[11]</sup> It was adopted by a United Nations Conference on 10 June 1958 and entered into force on 7 June 1959. Recognising the growing importance of international arbitration as a means of settling international commercial disputes, the New York Convention sought to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term 'non-domestic' embraces awards that, although made in the state of enforcement, are treated as 'foreign' under its law because of some foreign element in the proceedings (eg, another state's procedural laws are applied).

Widely considered the foundational instrument for international arbitration, the Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges parties to ensure such awards are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require member states' domestic courts to give full effect to arbitration agreements by requiring that those courts deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.



Jurisdictions in the Caribbean that were late in ratifying the New York Convention have increasingly come to appreciate the importance of ratifying this treaty. For instance, the ratification of the New York Convention has the potential of enhancing their ability to attract foreign investment as investors have proven more willing to invest in countries that offer protection for their investment. Even overseas territories such as Bermuda, the BVI and the Cayman Islands do not wish to be left out.

Thus, out of the roughly 168 parties to the New York Convention, 16 are from the Caribbean region: Netherlands Antilles and Suriname (1964); Trinidad and Tobago (1966); Cuba (1974); Bermuda (1979); Belize (1980); the Cayman Islands (1980); Haiti (1983); Dominica (1988); Antigua and Barbuda (1989); Barbados (1993); St Vincent and the Grenadines (2000); Jamaica (2002); the Dominican Republic (2002); Bahamas (2006); the BVI (2014); and Guyana (2014).<sup>[12]</sup>

As the above reveals, in the intervening 42 years between 1958 and 2000, there were only 10 ratifications from countries in the Caribbean; however, between 2000 and 2014 there have been six ratifications. This suggests an increasing awareness of the importance of ratification of the New York Convention, and serves as a stimulus for other jurisdictions in the region to ratify this Convention.

### **Inter-American Convention On International Commercial Arbitration**

The Inter-American Convention on International Commercial Arbitration (the Panama Convention), which was adopted in 1975 and came into force in 1976, is another worthwhile international accord that Caribbean countries should endeavour to adopt with a view to improving their international arbitration infrastructures. Currently, the Dominican Republic is the only Caribbean party to the Panama Convention.

Considering that numerous Caribbean territories have aspirations of becoming hubs for not only regional but also international arbitration, whereby they wish to become attractive to Latin American countries, in modernising their arbitration rules, those territories should consider joining the Panama Convention, lodging a reservation similar to that of the United States. That reservation limits the Panama Convention to arbitration agreements in which the majority of the parties are citizens of member states of the Panama Convention and the Organization of American States, unless the parties agree otherwise.

For other arbitration agreements, the New York Convention would apply.<sup>[13]</sup> Adoption of the Convention is likely to see an influx of disputes to the region from Latin America as those countries are more likely to trust arbitration under this treaty; thus, especially for jurisdictions aiming to position themselves as international arbitration centres, whose key market will be Latin America, it has been suggested that it was the Panama Convention that shifted the traditional hostility away from international arbitration in Latin America.<sup>[14]</sup>

### **THE INTENSIFICATION OF INTERNATIONAL ARBITRATION IN THE CARIBBEAN: A JURISDICTIONAL ANALYSIS**

The foregoing provided a brief insight into the intensification of arbitration in the Caribbean region as illustrated by those countries' attempts to institute the necessary framework to establish themselves as international arbitration centres. It examined the extent to which territories have modernised their legal systems to make them conducive to international arbitration by modernising their arbitration legislation, ratifying the New York Convention 1958.

However, this does not give justice to the intensification process that has occurred over the past few years, with several jurisdictions viewing their arbitration product as ripe enough to establish themselves as international arbitration centres. This section will examine the different initiatives currently being undertaken by jurisdictions in the region.

### **Bahamas**

Arbitration legislation has been part of the Bahamas' suite of legislation for a very long time. The infrastructure of arbitration legislation, facilities and skilled personnel has attracted major cases to the Bahamas. The strategic location of the islands just off the US mainland has made it an ideal location for US parties seeking a neutral venue to resolve their disputes.

Driven by this, the Bahamas entertains aspirations of establishing itself as a regional and international hub for international arbitration. It ratified the New York Convention in 2006 and incorporated it into domestic law through the Arbitration (Foreign Arbitral Awards) Act 2009.<sup>[15]</sup> For the Bahamas, the impetus to sign the New York Convention came originally from the maritime sector. As arbitration is a preferred method of resolving maritime disputes and as the Bahamas is the seventh-largest ship registry in the world according to Lloyds, ratifying the New York Convention was imperative to allow awards to be automatically enforceable in signatory states.<sup>[16]</sup>

Early in 2013, the Bahamas government formed the Arbitration Council, designed to provide an action plan for establishing the Bahamas as a major arbitration hub. The Council, comprising members from the government and private sector, is mandated to:

- consider how to generate more activity in this area;
- to position the Bahamas as a leading arbitration hub and gateway to investment in the region;
- to establish commercial and maritime arbitration centres; and
- prepare the appropriate strategic or business plans.

As part of this initiative, the Arbitration Committee of the Bahamas Financial Services Board has encouraged a complete revamp of the arbitration legislation. The International Commercial Arbitration Bill 2018 is based on the UNCITRAL Model Law and reflects the intent of the Bahamas to become a new arbitration seat. The Bill 2018 gives certain powers to the Permanent Court of Arbitration, including power as appointing authority.

### **Barbados**

Arbitration in Barbados revolves around the following main pieces of legislation: the Arbitration Act 1958; the Arbitration (Foreign Arbitral Awards Act) 1980; and the International Commercial Arbitration Act 2007.<sup>[17]</sup> The Arbitration Act applies to domestic arbitration and international arbitration that are not of a commercial nature. The New York Convention, to which Barbados is a party, is given effect in Barbados under the Arbitration (Foreign Arbitral Awards) Act.

Barbados' ambition to establish itself as a regional hub for international arbitration is explicitly advocated in its legislation. According to section 4 of the International Commercial Arbitration Act, two of its objectives are: to establish in Barbados a comprehensive, modern and internationally recognised framework for international commercial arbitration

by adopting the UNCITRAL Model Law; and to provide the foundation for the establishment in Barbados of an internationally recognised centre for international commercial arbitration.

This jurisdiction also engaged in discussions with the LCIA to establish an office on the island.<sup>[18]</sup> In 2007, the government announced the signing of a letter of intent with the LCIA so that it could establish in Barbados its first regional office and contribute to making Barbados a more desirable venue for international arbitration. This letter of intent was to be followed by a memorandum of understanding by the end of 2007.

It was hoped that a relationship with one of the most reputable arbitral institutions in the world would provide a significant platform for Barbados to develop its international arbitration product. Arbitration was going to be Barbados' new niche where it could, from this location, service arbitration for Latin America and the Caribbean. Policymakers were of the opinion that enhancing the countries' arbitration product would benefit the international financial services sector, tourism, law, accounting and the business development. Invest Barbados would work closely with the Barbados Tourism Authority to promote Barbados as the region's centre of choice. Cases would be managed through the regional LCIA office and hearings would also take place there.<sup>[19]</sup>

However, such conversations have not materialised, and local attention seems to have shifted to a more indigenous effort. Nevertheless, as indicated by its suite of arbitration legislation and its attempts at cooperation with one of the most respected institutions in the industry, Barbados has shown its commitment to becoming a major arbitration hub and contributing to the growth of international arbitration in the region. In 2018, this was finally achieved with the establishment of the AMCC.

### **Bermuda**

Bermuda is one of the few jurisdictions in the region that has ratified the New York Convention and has a modern arbitration law based on the UNCITRAL Model Law, having enacted this legislation only eight years after the Model Law's establishment.

In Bermuda, there are two different arbitration regimes: the Arbitration Act 1986 governs the arbitration of domestic disputes, while the Bermuda International Conciliation and Arbitration Act 1993, which incorporates into Bermuda legislation the UNCITRAL Model Law, applies to international commercial arbitrations. This suite of arbitration legislation illustrates that Bermuda is no stranger to arbitration.

Arbitration is the typical form of dispute resolution used in the insurance and reinsurance industry in Bermuda. Liability insurance policies written on the 'Bermuda form' provide for either London or Bermuda as the seat of the arbitration. Arbitration is also occasionally used to resolve disputes between investors in mutual funds and shareholders of joint venture companies incorporated in Bermuda. Arbitration clauses used in insurance and reinsurance contracts typically do not provide for any arbitral institution to administer arbitrations with a Bermuda seat.

Apart from Bermuda's modern legislation, policymakers have sought to enhance the jurisdiction's attractiveness as a centre for international arbitration by modifying its immigration policy to make it international arbitration friendly. Under Bermudian labour policy, arbitrators sitting in an international commercial arbitration in Bermuda do not require work permits. Like many international arbitration centres, there is no requirement to be a Bermudian national or be licensed to practise in Bermuda in order to serve as an arbitrator in

Bermuda.<sup>[20]</sup> Therefore, it can be said that Bermuda is another one of the region's jurisdictions striving to become a major arbitration hub.

### British Virgin Islands

Traditionally known for its financial services industry, the BVI aspires to become a nerve centre for the resolution of international commercial disputes and to become the go-to country for international arbitration and all other forms of dispute resolution in the Caribbean, Latin America and beyond.

Arbitration legislation could be found in the BVI from the 1970s with the introduction of the BVI Arbitration Ordinance in 1976.<sup>[21]</sup> As the territory's policymakers came to recognise its potential as a major arbitration hub in the region, a key focal point became the need to modernise the territory's arbitration regime, with new arbitration legislation as an initial step.

Those efforts came to fruition in 2013 when the new Arbitration Act was enacted. This legislation is modelled after the UNCITRAL Model Law 1985, and section 93 establishes the BVI IAC.<sup>[22]</sup> The Act is one of the most modern arbitration statutes in any major commercial jurisdiction, and its flexibility and opt-ins, which enable parties to arbitration agreements to tailor certain aspects of its applicability to their needs, are perhaps what make the BVI Arbitration Act one of the most appealing to lawyers, globally.

In May 2014, the BVI government, through the government of the United Kingdom, ratified the New York Convention 1958. In 2015, the Cabinet appointed the inaugural board of directors of the BVI IAC. The board is chaired by world-renowned arbitrator and former president of the ICC International Court of Arbitration, John Beechey CBE.

The BVI IAC opened its doors on 16 November 2016, making the BVI the first jurisdiction in the Caribbean region to have established both an arbitral institution and a dedicated international arbitration centre, together with having modern legislation modelled after the UNCITRAL model and being a party to the New York Convention.

Upon opening, the institution adopted a brand new set of arbitration rules based on the UNCITRAL Arbitration Rules<sup>[23]</sup> and published a roster of international arbitrators. It also administers arbitrations under UNCITRAL rules.<sup>[24]</sup> Notwithstanding being relatively new, its institutional set-up and legislative backdrop enables the BVI IAC to confidently offer premier arbitration services, on par with more established centres.

What makes the BVI so attractive is the flexibility in its statutes: the Arbitration Act expressly provides the ability for parties to an arbitration agreement to opt in or opt out of certain provisions.

A powerful option allows parties to choose whether a court is to have jurisdiction to consider an appeal against an award, a challenge against an award on the grounds of serious irregularity, or to determine a point of law arising in the arbitration. Other opt-ins include providing the tribunal with the power to consolidate arbitrations and limiting the tribunal to a single member.

The BVI also allows parties to an arbitration agreement to choose a governing law that is distinct from the seat of arbitration. It also recognises that the hearing venue, applicable rules and the courts in which applications in aid of the arbitration may be brought are just some of the other matters that may relate to separate jurisdictions.

This kind of flexibility can be particularly useful for the enforcement of arbitral awards. In some countries, the process for the enforcement of awards in foreign arbitrations takes much longer and is potentially more problematic than the process for enforcement of domestic arbitrations (Brazil being a good example). The BVI provides foreign parties contracting with a party in such a jurisdiction the opportunity to choose that jurisdiction as the seat of arbitration, the law of a third-party jurisdiction as the governing law of the contract, but for the arbitration to be heard in BVI, and for the BVI courts to have exclusive jurisdiction in aid of the arbitration.

This example would provide a neutral venue and an experienced commercial court to assist with interim matters in aid of the arbitration, yet would result in an award that would be quickly and easily enforceable in that jurisdiction.

The BVI is also set up for virtual arbitration. With legislation based on the UNCITRAL Model Law, the BVI framework is flexible enough to support virtual hearings. For instance, article 18 of the Model Law – which includes that ‘each party shall be given a full opportunity of presenting his case’ – has been substituted (in section 44 (3) of the Act) by the following provision:

the arbitral tribunal is required to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents; and to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.

This is reinforced by article 17(1) of the BVI IAC Rules, which gives broad discretion to the arbitral tribunal on how to conduct the arbitration, provided the parties are treated with equality and that each party is given a reasonable opportunity to present its case. This kind of flexibility, recognised by various jurisdictions around the globe, is critical to ensure that proceedings cannot be challenged down the line.

Taking into consideration the level of commitment that has gone into the establishment of this institution, its facilities and the amount of attention that it is beginning to attract globally, the BVI appears to be way ahead of other jurisdictions in the region in terms of its offerings. A well-run and well-equipped state-of-the-art centre, together with the acknowledged quality of the BVI legal framework and the stable political environment offered by a British overseas territory, should enable the BVI to rapidly become the leading arbitration hub in Latin America and the Caribbean.

In 2017, the BVI government passed a Labour Code (Work Permit Exemption) Order, under which persons coming into the territory to undertake select classes of business will be exempted from the requirement of a work permit. One class of persons captured by this exemption, are persons coming into the territory to participate, in one way or another, in international arbitrations.

### **Dominican Republic**

The Dominican Republic has been active in the arbitration world for some time now.<sup>[25]</sup> In a region where most of the economic power houses are Spanish-speaking, the Dominican Republic’s vision of establishing itself as a hub for international arbitration does not seem so far-fetched. Like Bermuda and the BVI, it has enacted modern arbitration legislation based on the UNCITRAL Model Law and is a party to the New York Convention.

Law 489-08 on Commercial Arbitration of 19 December 2008 applies to arbitral agreements, proceedings and enforcement of commercial arbitration awards. Law 50-87 on Chambers of Commerce and Production, as amended by Law 181-09 of 6 July 2009, makes provision for international arbitration cases to be administered by the alternative dispute resolution (ADR) centres.

Law 489-08 is based on the UNCITRAL Model Law, with slight variations, including:

- a narrower definition of international arbitration because it does not have an ‘opt-in’ provision by which parties agree that the subject of arbitration can relate to more than one country; and
- the freedom of the parties to determine the number of arbitrators, as long as they are an odd number, and, if no such determination is made, a sole arbitrator shall be appointed instead of three (article 14).<sup>[26]</sup>

Recognition and enforcement of an award can also be refused if the court, on its own initiative, holds there was a disregard of due process amounting to violation of rights of a party, in addition to the grounds set forth in article 36(b) on the Model Law (article 46).

The Dominican Republic-Central America Free Trade Agreement calls for arbitration as the key mechanism for dispute resolution.<sup>[27]</sup> Moreover, the Dominican Republic has entered into 15 bilateral investment treaties with Argentina, Chile, Cuba, Ecuador, Finland, France, Haiti, Italy, Korea, Morocco, the Netherlands, Panama, Spain, Switzerland and Taiwan, which submit disputes to international arbitration.<sup>[28]</sup> Considering that Latin American countries have fiercely opposed international arbitration for most of their history, the Dominican Republic is a perfect illustration of the rise of international arbitration in the region.

### Jamaica

Like other common law jurisdictions in the Caribbean, Jamaica’s legal system was modelled after the English legal system. Likewise, its arbitration regime has historically been influenced by this legal regime; although considered by most countries to be archaic, portions of the 1889 and 1950 English Arbitration Acts were still present within arbitration laws in Jamaica.

International commercial arbitration in Jamaica is governed primarily by the Arbitration Act 1900 (the Jamaican Act of 1900) and the Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001, which makes provision for the application of the New York Convention. Jamaica has been actively involved in arbitration in the mineral sector, especially bauxite.

Although outdated, the Jamaican Act of 1900 was designed to facilitate arbitration. Under this piece of legislation, the court will generally stay proceedings where a valid arbitration agreement is in place, and may remove an arbitrator engaged in misconduct. Thus, in recent years much attention has been centred on modernising the century-old Arbitration Act to bring it in line with the UNCITRAL Model Law.<sup>[29]</sup> This was done in 2017 with the new Jamaican Arbitration Act 2017 based on the UNCITRAL Model Law.

In late 2016, Jamaica launched MICAM, now called the Jamaica International Arbitration Centre (JAIAC),<sup>[30]</sup> which functions from an operational hub in the Faculty of Law at Mona, the University of the West Indies. This institution aims to serve the growing need in Jamaica for arbitration and other ADR options for the settlement of disputes.<sup>[31]</sup> The JAIAC aims to

administer arbitration under both its fast-track arbitration rules and the UNCITRAL arbitration rules.

With the introduction of the JAIAC and the potential enactment of Jamaica's new arbitration legislation in the future, Jamaica is on track to become another hub for arbitration.

### **Trinidad And Tobago**

Trinidad and Tobago has been engaged in international commercial arbitration cases, particularly in the petroleum sector, for a very long time. Arbitration in Trinidad and Tobago is governed by the Arbitration Act Chapter 5:01,<sup>[32]</sup> which is also based on early English legislation and, as such, has provisions similar to those under the Jamaican Act of 1900. The New York Convention 1958 was given effect in Trinidad and Tobago by the Arbitration (Foreign Arbitral Awards) Act Chapter 5:30.

In 1996, Trinidad and Tobago established the Dispute Resolution Centre of Trinidad and Tobago as part of the Trinidad and Tobago Chamber of Industry and Commerce by the then chief justice, Michael de la Bastide.<sup>[33]</sup> The goal of the Dispute Resolution Centre is to become the premier institution for the promotion and operation of an ADR training and referral system within Trinidad and Tobago and the wider Caribbean. The institution seeks to deliver creative, out-of-court dispute resolution approaches in an independent, ethical, timely, confidential and cost-effective manner. Moreover, it seeks to provide a trusted cadre of dedicated and experienced mediators, arbitrators and other neutral professionals, facilitators and support resources, committed to delivering high-quality innovative approaches to mediation, arbitration and other modes of dispute resolution, complemented by advanced training and outreach programmes.

While the jurisdiction has demonstrated its commitment to addressing the country's need for international arbitration facilities, to compete in the rapidly expanding world of international commercial disputes, the country must upgrade its arbitration legislation.

### **INTERNATIONAL ARBITRATION IN THE CARIBBEAN: LOOKING TOWARDS THE FUTURE**

Promotion of international arbitration in the Caribbean may have had a slow start, but adoption of arbitration as a preferred dispute resolution mechanism is accelerating across the region. Jurisdictions in the region appear to be on track to meet the demand for international arbitration facilities in this part of the world.

As Caribbean jurisdictions have come to appreciate the importance of international arbitration as the ideal dispute settlement mechanism in the rapidly evolving world of international commerce and transborder transactions, they have begun to upgrade their legal systems to cater to this market. Numerous jurisdictions in the region are now party to the New York Convention, and the upgrading of domestic laws to cater to international arbitration is gaining momentum. This is a significant level of development for a region where the use of international arbitration has not been traditionally endorsed.

Notwithstanding the aforementioned progress, many jurisdictions in the region still lack modern international arbitration infrastructure. Much legislation continues to be based on archaic models, better suited for the commercial transactions of their time, rather than the modern transboundary transactions that characterise global commerce these days.

For instance, although the UNCITRAL Model Law 1985 is designed to assist states in reforming and modernising their laws on arbitral procedure to take into account the particular

features and needs of international commercial arbitration in contemporary times, the majority of the jurisdictions in the Caribbean have not yet adopted any modern arbitration legislation. The arbitration laws of Antigua and Barbuda, Dominica, Grenada, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines, for instance, are all based on the English Arbitration Act of 1950.<sup>[34]</sup> So while the English Arbitration regime is governed by the Arbitration Act 1996, former English colonies in the region have not upgraded their arbitration regimes decades after their independence.

The New York Convention 1958 has better representation in the region, but compared to the number of jurisdictions in the region, this is still a small representation. A review of the list of countries that are yet to ratify the New York Convention indicates that Grenada, St Kitts and Nevis, St Lucia and Suriname have not ratified the New York Convention. This suggests that those jurisdictions have not yet come to appreciate the importance of this instrument in enhancing their attractiveness as investment hosts.

In determining whether a particular jurisdiction is ideal for investment, potential investors look favourably on their ability to protect their investment by being able to enforce awards from disputes arising from those investments. Thus, to improve their domestic international arbitration regimes, it is suggested that the countries that have not updated their domestic arbitration legislation do so, as the benefits of upgrading their arbitration regimes can be significant. It is advised that Grenada, St Kitts and Nevis, St Lucia and Suriname ratify the New York Convention. Additionally, the countries of which the domestic arbitration legislation is modelled after an outdated model should aspire to look towards the UNCITRAL Model Law for guidance in upgrading their arbitration laws.

Apart from instituting the necessary policy infrastructure, it is necessary for those jurisdictions to continue along the path of political stability; to respect the rule of law; and to ensure supportive and impartial judiciaries. These features are vital to the success of international arbitration in those jurisdictions. While these notions are all interlinked, to enhance clarity, they will be dealt with separately.

Political stability, as a prerequisite to a thriving economy, is critical to the success a country may have in becoming a well-regarded jurisdiction for international arbitration. Political instability, however, has a significant negative impact on business and tends to push away foreign direct investment as investors, who tend to chase yield while managing their risk profiles, are attracted to more stable and predictable business environments. When firms operate in politically unstable jurisdictions, operational costs tend to be higher because their business model must build in flexibility and adaptability so that they can reinvent their operations at very short notice to reflect changes in the political environment.

Even in countries perceived as politically stable, as most jurisdictions in the region are, political change can have a significant impact on business. This may simply be because governments make wide-ranging changes to the legal framework, but it could also be that a change of government changes political attitudes towards business. This may result in less 'business-friendly' policies, such as increased taxation and regulations for businesses. Thus, political stability is a highly desirable feature of jurisdictions seeking to present themselves as ideal locations for conducting high-level business transactions and a place for resolving disputes that occur pursuant to those transactions.<sup>[35]</sup>

Respect for the rule of law is paramount in this industry. Despite the fact that parties agree to submit a dispute to arbitration, not under the constant gaze of the court, and, as such,



arbitrariness can easily ensue, it is important that those jurisdictions' legal systems are founded on the respect for the rule of law.

From ancient Greece through the Middle Ages and through the 20th century, businesses and states have relied on arbitration to resolve disputes, and arbitration has created and enforced the rule of law. Arbitration has created certainty that commercial transactions could be upheld, provided a mechanism for private persons to bring claims against governments and even avoided war between states.

Today, the success of the system has caused some stress, and some have even said that the system itself is threatened as the legitimacy of the process is constantly being questioned. Thus, it is incumbent on those who practise in the field of international arbitration to preserve the system to enforce the rule of law.<sup>[36]</sup>

Although some may say that the arbitral process is the consequence of an agreement between the parties and, as such, should be devoid of external influence, the arbitration process is dependent on support from the judiciary, for instance, where the court is mandated to stay proceedings pending arbitration or where enforcement is to take place in the same jurisdiction as the seat of arbitration. The judiciary's much-needed support towards this dispute settlement mechanism means that the local court system is an important ally.

As mundane as this may seem at first glance, considering the fact that parties pursue arbitration to get away from the courts, support from the judiciary is a very important facet of the arbitral process. The importance of the judiciary's role in the arbitration process can be summed up in the words of England and Wales House of Lords judge, the late Lord Mustill, who is quoted as having said:

Ideally, the handling of arbitrable disputes should resemble a relay-race. In the initial stages . . . the baton is in the grasp of the court. . . . When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award.

Therefore, it is clear that the arbitral process needs the partnership of local courts to ensure its effectiveness. Lord Mustill confirms:

The old and sterile confrontation between the "minimalists" and the "maximalists" regarding the part to be played by the domestic courts has now given way to a recognition that the courts must recognise the essential role of arbitration in international commerce, and give it the maximum permissible support; and a converse recognition that arbitration cannot flourish without that support.

Cooperation in all phases of arbitration proceedings will contribute to the growing awareness that arbitration yields efficient conclusions, with the extra benefit that accountability may be demanded much sooner than litigation, which has been the traditional method of resolving commercial disputes. Moreover, judicial cooperation with arbitral tribunals is connected with, and a function of, modern arbitration statutes.

## CONCLUSION

This article examined the rise of international arbitration in the Caribbean, a region where this dispute settlement mechanism has not been traditionally promoted, as seen in the archaic nature of domestic arbitration laws in many jurisdictions. It revealed that, historically, jurisdictions in the region have not paid particular attention to the promotion of international arbitration. For instance, the New York Convention, which was adopted in 1958 and came into force in 1959, has still seldom been adopted in the region. Likewise, the region as a whole has not paid much attention to the UNCITRAL Model Law 1985, which was developed to assist states in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration in contemporary times.

Nevertheless, over the past few years there has been an intensification in the promotion of international arbitration, with various jurisdictions upgrading their domestic arbitration legislation, the adoption of the New York Convention for countries that had not previously adopted it and the emergence of several aspiring international arbitration institutions in the region.

Although the BVI has established an international arbitration centre in the region and the Bahamas, Barbados, Bermuda, the Dominican Republic, Jamaica, and Trinidad and Tobago are all aspiring to do the same, the sophistication of the Caribbean region as an arbitration hub is still a work in process.

Maintaining and enhancing political stability, respecting the rule of law and ensuring impartial judiciaries are also all essential elements in enhancing those jurisdictions' attractiveness as places for the resolution of commercial disputes. Progress in the aforementioned individual jurisdictions coupled with the noble work that OHADAC has undertaken in promoting arbitration, suggests that the Caribbean is no longer simply a place to sit on a beach sipping on the region's finest rums, but also an increasingly attractive place to do business and conduct arbitration.

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**Francois Lassalle**  
**Hana Doumal**

lassallef@bviiac.org  
doumalh@bviiac.org

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BVI International Arbitration Centre, PO Box 3438, Road Town, Tortola VG1110, British Virgin Islands

**Tel:** +1 284 393 8000

<http://www.bviiac.org/>

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